seeing warning signs and that he had worked around electricity before and was aware of the danger in transformers. Petitioner further relied upon the foreman's testimony that he knew of the danger (R. 20; 21). The jury returned a verdict for respondent on September 13, 1956 (R. 52). The trial Court overruled petitioner's Motion for Judgment Notwithstanding the Verdict on June 20, 1957 (R. 55, 56), and appeal was taken.

On July 15, 1959, the division which first heard the appeal filed opinions, later withdrawn, reversing 2 to 1, the reversal being based upon respondent's personal knowledge of the danger and upon warning to him. The division of three different judges who heard the subsequent reargument, on its own motion set aside the submission and filed no opinion. The Court en banc, having heard further argument, affirmed the trial Court on April 17, 1959 (App. 11). In the latter decision, the majority purported to enumerate the petitioner's contentions as two fold and involving only the claim that respondent personally knew of the danger and the claim that the warnings satisfied any legal duty of petitioner (App. 21). It did not discuss or determine the contention that the foreman was warned, and admitted knowing of the danger, and that petitioner was therefore, as a matter of law, not negligent. Petitioner filed a Petition for Rehearing which was denied on May 11, 1959.

Portions of petitioner's briefs in the Court of Appeals are appended hereto because neither the Record nor the Transcript of Record establishes the fact that the contention relating to the employer's knowledge was urged throughout the appeal.

Petitioner consistently contended, in its original Brief (App. 50, 60, 62, 68-77, 81), in its Reply Brief (App. 90, 97, 99, 100), in printed Arguments following the withdrawal of the original opinion (App. 104, 106, 107, 108, 113,

114, 115, 118, 119-122), and at each of the three oral submissions, that the foreman was warned and had acknowledged warning and knowledge of the danger, and that this constituted a complete defense. It reiterated its argument on these points in its Petition for Rehearing (App. 125, 126-129).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals should be reviewed because:

1. Petitioner has not been accorded determination of a point of law which, if decided in its favor, would be determinative, and has thus not been accorded its day in court.

2. Public interest requires that those who engage independent contractors should be apprised of any rule prevailing in the Eighth Circuit which will deprive them of the defense relied upon by petitioner.

The Court of Appeals held that under Iowa law the duty of petitioner was limited to warning of latent perils (App. 18, 19). If, as contended, warning to the employer discharged the duty, or, because of the employer's knowledge of the peril no duty was imposed, the petitioner was entitled to reversal unless a jury could properly have decided that the employer was not warned and did not know. The foreman acknowledged both warning and personal awareness of the danger (App. 20-21), and the jury could not properly have found otherwise. Therefore, a decision in favor of the petitioner on the legal question would have determined the matter in its favor, irrespective of whether jury questions existed as to respondent's personal knowledge or warnings to him.

Due process and the provisions of Title 28, U. S. C. 1652, require that this question be determined, whether for or

against petitioner, and this is true even though, as hereinafter appears, the Iowa Courts have not passed upon it specifically and it is difficult of determination.

In **Huddleston v. Dwyer**, 322 U. S. 232, this Court, after holding that state law controlled in the case, said:

> "It is the duty of the federal appellate courts, as well as the trial court, to **ascertain and apply** the state law where, as in this case, it controls decision." (Emphasis supplied.)

In **Bernhardt v. Polygraphic Company of America**, 350 U. S. 198, the Court of Appeals had failed to decide applicable state law under the erroneous impression that federal law governed the issue involved.

Mr. Justice Douglas, in delivering the opinion of this Court, pointed out that a federal court enforcing a state-created right in a diversity of cases is "only another court of the State" and may not "substantially affect the enforcement of the right as created by the State."

Mr. Justice Frankfurter, in a concurring opinion, discussed the fact that difficulty in determining the applicable state law does not overcome the considerations which dictate that it must be determined, as follows:

> "* * * One of the difficulties, of course, resulting from Erie R. Co. v. Tompkins, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights. * * *"
>
> "As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can

make in ascertaining what the state court would rule to be its law. * * *"

Thus it appears that the difficulty which would face the Court of Appeals in deciding what the Iowa law is on this question does not relieve it of the duty to do so in this case.

In many instances a case can be decided without determination of all of the points raised. As an example, in this case we urged that the employer was guilty of intervening negligence which was the proximate cause of the injury. The holding that the jury could have found that negligence of the petitioner was the proximate cause eliminates this contention because any negligence of the employer would have been only concurrent therewith, and the Court, holding as it did, quite properly failed to discuss whether or not it existed. We are in complete accord with the view that federal Courts should avoid determination of state law where it is in doubt and **where it is unnecessary in order to decide all critical issues.**

Here, however, determination of the law of Iowa is vital. Petitioner's contentions were not interdependent, but each, standing alone, if sound, would be determinative. Had petitioner not raised any question as to respondent's personal knowledge or as to having warned him personally, it would nevertheless be entitled to reversal if the contention in question had been ruled upon in its favor. The failure to do so is tantamount to a situation wherein only this point has been raised and the Court of Appeals refused to hear the appeal or refused to decide it.

The law of Iowa imposing and limiting the duty having been stated by the Court of Appeals, and the opinion being devoid of any holding that knowledge of, or warning to, the employer does not discharge it, one who finds himself in the position of this petitioner will be misled as to what his obligation is.

White's Supplement to Thompson on Negligence, Sec. 979, states the rule as follows:

> "It is the rule that the owner of property owes to an independent contractor **and his servants at work thereon** the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury **were known to the contractor.**" (Emphasis supplied.)

In Engle v. Reider, 366 Pa. 411, 77 A. 2d 621, the Court considered an instruction which it quoted as follows:

> "The extent of the duty of the owner of the building who employs an independent contractor to the latter's employees (that is, Routman's employee, Engle) with respect to known or discoverable dangerous conditions existing on the premises where the work is to be done, is to warn the contractor of their existence; **he is not required to warn every subcontractor and laborer who comes on the premises.** In this case, * * * the **Reiders had no obligation to warn Engle, an employee of Routman.** His full duty was performed with regard to this dangerous condition when he warned the contractor Routman. If you find that he did warn the contractor Routman; or, if you find that Routman did not need to be warned because of his superior knowledge of the danger of unvented flues, or because of his having visited the premises five or six times he saw, or ought to have seen this obvious danger and realized it—and he says he did—then Reider's full duty to those business visitors, Routman and Engle, was to notify Routman, or be sure that Routman knew of the existence of this condition which was dangerous; and if he had done that he did not need to go farther; **he did not need to go as far as to notify Engle.**" (Emphasis supplied.)

The Pennsylvania Court approved this instruction and others as being "in complete accord with the law of Penn-

sylvania", citing three cases and the section of White's Supplement set out supra.

In **American District Telegraph Co. v. Kittleson**, 179 F. 2d 946, the Court of Appeals for the Eighth Circuit held that the Iowa cases support an instruction, objected to, **not** by the property owner, but by the defendant employer, who stood in the shoes of the plaintiff in an action over, which instruction read in part:

> "You are instructed that if you find that the condition of the skylight in question did present a hidden defect, danger or pitfall to persons using the roof, and Armour & Company knew, or in the exercise of reasonable care, should have known, of such condition and should have reasonably expected that the defendant's employees would use said roof in the performance of their duties then the failure to warn the defendant **or** its employees of such hidden defect, danger or pitfall constituted negligence. * * *" (Emphasis supplied.)

In numerous cases involving owner-invitee relationships, the Iowa Supreme Court has held that a warning to a lessee discharged all obligation on the part of the owner to warn the lessee's invitee, notwithstanding the fact that the invitee was also an invitee of the owner.

A lawyer, called upon by the owner of property to express his opinion as to the owner's liability to the employees of an independent contractor, would, after researching the question, doubtless inform the owner that, in the absence of affirmative negligence, his obligation would extend only to being sure that the contractor is aware of any hidden peril, and would perhaps suggest that the owner procure the contractor's written acknowledgment of his awareness of the danger. Study of the decision in this case would not cause him to doubt his opinion.

Certainly the public interest demands that lawyers and, in turn, their clients who engage independent contractors

be warned of the apparent position of the Court of Appeals. It is hardly just that one should reach the Court of Appeals before learning that the knowledge of the contractor—irrespective of the evidence thereof—is no defense to him despite the general rule that it is.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

COURT OF APPEALS OPINION FILED APRIL 17, 1959.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,887.

Clinton Foods, Inc., a corporation, Appellant,

vs.

Marvin Youngs, Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[April 17, 1959.]

Craig Cook and Wayne G. Cook (Cook, Blair, Balluff, Wedean & Nagle, were with them on the brief) for Appellant.

Carl H. Lambach (Margaret Stevenson; Isador Katz; Lambach, Stevenson & Dircks; and Reidy, Katz, McAndrews, Durkee & Telleen, were with him on the brief) for Appellee.

Before Gardner, Chief Judge, and Sanborn, Woodrough, Johnsen, Vogel, Van Oosterhout, and Matthes, Circuit Judges.

Matthes, Circuit Judge.

In this diversity case, Marvin Youngs, plaintiff below, employee of contractor engaged in work on defendant's

premises, obtained a jury verdict and judgment for $80,000, as damages for personal injuries received from electrical shock. Clinton Foods, Inc., defendant below, filed timely motions for directed verdict and for judgment notwithstanding the verdict, which were denied, and this appeal followed. We shall refer to the parties as designated in the trial court.

We have for determination the sole question of whether, under the evidence, the jury could properly find that the defendant negligently failed to give adequate and sufficient warning in view of the circumstances existing when plaintiff was injured. Since the primary question is focused upon the sufficiency of the evidence, defendant cannot prevail unless it is determined that there was no reasonable basis upon which findings of negligence and defendant's ultimate liability for plaintiff's injuries could be based. See **Gowing v. Henry Fields Co.**, 225 Ia. 729, 281 N.W. 281, 283, where the court stated:

> "In passing on defendant's motion to direct a verdict, the plaintiff is entitled to have the evidence considered in the light most favorable to him. • • • 'Every inference reasonably permissible in support of the issue should be carried to the aid of the evidence.' **McWilliams v. Beck**, 220 Iowa 906, at page 909, 262 N.W. 781, at page 782."

See also, **Egan Chevrolet Co. v. Bruner**, 8 Cir., 102 F.2d 373, 377, 122 A.L.R. 987. The case rests upon this factual foundation:

Defendant, as the owner of a food processing plant at Clinton, Iowa, entered into a contract in 1953 with Pittsburgh Piping and Equipment Company, plaintiff's employer, for the installation of a new turbine on defendant's property. In order to effectuate the installation, Pittsburgh was required to lay a 20-inch pipe line on the premises of defendant. The controlling plans and specifications,

as prepared by defendant, required that the pipe line be laid on and along a portion of defendant's property which was enclosed. In the enclosed area were two banks of electrical transformers. A photograph and other evidence reveal that one set of transformers, referred to as "emergency transformers," has the appearance of three cylindrical objects of metal, approximately 4 feet in height, with insulated electric wires leading into and out of the top of each cylinder. These "emergency transformers" were resting upon a concrete foundation, the top of which was approximately two feet above the surface of the adjacent ground. It also appears that defendant had its own power plant and generated its own electrical energy, but to ward against a possible power failure in its own plant, electric energy was obtained from the Interstate Power Company, and such energy was transmitted through the emergency transformers. Although they did not feed current into defendant's plant, except on the rare occasions when defendant's own power plant failed, the emergency transformers were, in the words of its mechanical engineer, "kept live all the time because they would all cut in. They were not serving any purpose other than in those rare times." However, the same witness testified that the cylindrical case around each transformer was not "live." "They are grounded out so there is no danger in touching them." Electric current was brought into the emergency transformers by a "feed-wire." This is the wire which plaintiff came into contact with and which caused his injuries. It carried from 6,900 to 13,200 volts, and was mounted vertically along the frame supporting the transformers. This wire was covered with insulation. With reference thereto, we have this information from a Mr. Shannon, defendant's mechanical engineer:

> "The wire coming down to the rear on Plaintiff's Exhibit 5, is the one—the high tension line. It is also shown on Exhibit 3. It comes down and is fastened to

an insulator. Loops out here and then goes up into the transformer. Here is disconnecting switches there. • • • The wire that comes down out of this insulator was covered with an insulating substance, but it wasn't insulated for that purpose. It happened that it was the right sized wire and they used it. It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there."

By the same witness, it was further developed that there was a switch whereby the current could have been cut off from the emergency transformers, but it was not the practice of defendant to open the circuit switches and cut off the current. The defendant's Superintendent of Power in his testimony explained the reason why the defendant considered it necessary to keep these transformers constantly energized, and, among other things, said: "A very temporary shutdown of the emergency transformer, such as 5 minutes, could have endangered our plant."

The current generated by defendant's plant was fed through the other set of transformers mentioned, which were located about twelve feet from the emergency transformers. These transformers, known as "step-down" transformers, carrying 440 V. were not encased, and were described as "corrugated, cylindrical objects," with an exposed bus bar to the rear of them.

In installing or laying of the water main, it was necessary to first dig a ditch near both sets of transformers, described above and it was while the crew of Pittsburgh's men were engaged in laying a section of the water main in the ditch near the emergency transformers, that plaintiff came in contact with the lead-in insulated wire before described. At that time, plaintiff was required to work on

an artificially raised ground level in, closer than usual proximity to the emergency transformers and lead-in wire. The events surrounding and immediately preceding the occurrence were described by Pittsburgh's foreman, Edward Morgan, in this manner:

> "I saw Mr. Youngs immediately before he got hurt. I was standing on one of the dirt piles north of that emergency transformer bank, facing towards the slough.
>
> "We were putting this piece of pipe in the ditch, and we had a chain fall on this timber over the center of the ditch. We had a rope snubbed on each end of the pipe and Sullivan and I was on the one end and we had it snubbed around a telephone pole, and the other boys, two of them were on the other one or one of them was, or one on the chain fall, I don't remember. I know I was on the one line that was around the telephone pole, and we was holding the pipe back snubbing it while it was being dragged in the ditch by the chain fall with the fellow on the chain fall and as the pipe swung in the ditch and settled down I looked up, turned to the pump house and looked up and Bud (Youngs) was taking a step or was going off that plank, as I see it, off the plank towards the pump house, and the only thing I think he was going, he was going over to the ladder next to the pump house to go down the ladder to help land the pipe in the ditch. As he stepped in that direction I saw a big flash and a drop of—like a drop in power or short, and that was it • • • Bud fell back I would say north away from the pump house, and he fell and his shoulders hit across the timber we had across the ditch and his arm fell over the top of the timber and his head, or whichever you want to call it, head or neck, maybe a difference of opinion there, rested up against the angle iron on the corner of that transformer bank. The dark end spot on the angle iron, as it appears on

Plaintiff's Exhibit 3, is where his head or neck was resting—that burned spot."

The record also establishes that the defendant actively supervised the installation of the project and particularly the laying of the water main. Mr. Shannon, defendant's engineer, testified: "[t]he laying of the water main along the bank on the property was directly under my charge," and "[i]t was my particular job to see that that pipeline was in accordance with specifications * * *."

On the warning issue. There were several signs in and on the enclosure displaying the words "Dange 13,200 Volts." One of these signs was on a pole approximately six feet from the place where plaintiff came in contact with the wire, and the other signs were on the fence enclosing the area. As to oral warnings, there is decided conflict and dispute. However, there was unequivocal testimony from which a jury could find that all oral warnings given by defendant were directed to the open, corrugated transformers and the 440 Volt bus bar, and that there was a total failure to warn of the danger lurking in the lead-in wire to the emergency transformers. On this issue, plaintiff testified:

"We had worked intermittently about 5 days in the area. At the time that they first discussed going through that enclosed area with a pipe line, several of the boys and myself discussed whether or not that was a wise idea. Of course we don't design the jobs nor is it our place to say where it goes. Our job is to do it. We discussed that, and the only information or warning that I ever got was the fact of an exposed bus bar at the far end. That came up at the time when Mr. Owen and Mr. Johnson were laying out elevation lines in the ditch itself, for the excavation of the ditch. That was the incident to which Mr. Morgan testified yesterday. I had never received any warning

of any kind to indicate that the wire you are pointing out which runs down a steel flange to what appears to be the rear of transformers that have been identified as emergency transformers, present any unusual hazard. We had not been warned that the wire was the equivalent of a bare wire carrying 13,000 volts. Had it been bare, we wouldn't have gotten within 3 foot of it.

"At no time, prior to October 9, when I was injured as others have described, did I ever hear any discussion from anybody, either my employer or Clinton, of an offer of rubber mattresses or any other safety devices to shield us against any dangers. I can best answer your question as to whether I was aware of any dangers other than the bus bar that might have required such protection, by saying that transformers ordinarily are dangerous, but it is primarily the wiring above the transformer—high up out of reach—and, as a matter of fact, all of the high voltage wires I have ever seen have been bare wires when they come in a transformer area. From the picture, that wire was covered."

The testimony of Mr. Shannon, defendant's mechanical engineer, as to the warning imparted by him, reduced to narrative form, is:

"As nearly as I remember, I said, loud enough so that any of the workmen could hear, and purposely so, 'Watch out for those transformers. They are hot and they will bite.' That was the nature, character and phraseology, in substance, as near as I can remember. I went into detail about it once over by the pumphouse where it was 440 volts [the open corrugated transformers], and where they were throwing dirt up there. I said, 'Now, you are getting where that is dangerous. You can walk right into that and if you do it will bite.' In that situation I specifically pointed out the bus bar because they had piled the

dirt so high you could walk right into it. I don't know who was present when I said that. I didn't pay any attention to the particular men."

Another witness, a former employee of Pittsburgh, stated: "We had been told that the only thing we had to worry about was the bus bar. It was Eddy (Mr. Morgan) told us. I don't know who told him. Nothing specific otherwise was called to my attention." And finally, Mr. Hartmann, electrical engineer for defendant, gave this version:

> "In my dealing with Mr. Muter I knew that he was going to be working in this danger area, and I therefore told him on several occasions that he should be careful as the conditions in there would warrant and, at the time he first started digging in there I warned him that there was a possibility of someone getting in contact with the open bus on the 440-volt transformer and the answer I received was, 'Well, no one has up to this time.'"

It stands conceded that plaintiff as an employee of an independent contractor, was a business invitee. The Iowa law, which controls here, in respect to the duty owed by the owner of premises to an independent contractor or an employee of such contractor, is clearly stated in **Gowing v. Henry Field Co.**, 225 Ia. 729, 281 N.W. 281, at page 284, in this language:

> "The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee **and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered. Steele v. Grahl-Peterson Co.**, 135 Iowa 418, 109 N.W. 882.

"Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew of or ought to have known of, **'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co.**, 89 Conn. 622, 95 A. 22, 25; 44 A.L.R. 894, note; **Arizona Binghampton Copper Co. v. Dickson, Adm'r**, etc., 22 Ariz. 163, 195 P. 538, 44 A.L.R. 881." (Emphasis supplied.)

More recently, in *Atherton* v. *Hoenig's Grocery*, 86 N.W.2d 252, 255, the Supreme Court of Iowa re-announced the principle that an owner of premises is under a duty to warn an invitee of any danger of which the owner was aware and of which the invitee was unaware.

With the law in this posture, the crucial question is—Do the facts establish, as a matter of law, that plaintiff was adequately warned or was aware of the dangerous instrumentality which caused his injury, or in the exercise of ordinary care on his part, could he have discovered such danger? Viewed in light of all of the circumstances, if the factual situation is such that reasonable minds could differ as to whether the warning given was adequate and sufficient, then we must resolve the issue in favor of plaintiff.

One important circumstance to consider is that here, unlike the situations in **Gowing** and **Atherton**, we are concerned with the dangerous agency of electricity. This circumstance does not necessarily change the legal duty imposed upon one in charge of the dangerous element, but it is abundantly clear from the expression of the courts dealing with Iowa law on the subject, that the character of the instrumentality must be taken into consideration in

determining whether those in charge thereof have in fact exercised reasonable or ordinary care. Thus, this court stated in **Yarn v. Ft. Dodge D.M. & S.R. Co.**, Iowa, 1929, 31 F.2d 717, 718, cert. den. 280 U.S. 568, where the employee of a mining company, which was furnished electricity by defendant, was injured while removing a steam pipe in close proximity to bare high tension wires:

> "The defendant is not an insurer; like all others, it is liable for failure to exercise reasonable care **under the circumstances.** But the care required of one installing 22,000 volt wires is different from that required of one installing steam pipes, just as the mythical 'reasonable man' must drive a car loaded with cans of nitroglycerine more carefully than he need drive the same car loaded with cans of milk." (Emphasis supplied.)

In **Iowa-Illinois Gas & Electric Co. v. Young**, 8 Cir., 179 F.2d 485, 489, Iowa, 1950, this Court was required to pass upon the propriety of the trial court's instruction in which the jury was told that in determining the question of whether defendant was negligent—

> "'* * * it is proper for you to consider, together with all the other facts and circumstances, that the handling of electricity is a matter that requires skill and understanding of the dangers thereto; that a current of electricity of high voltage is a dangerous and deadly element traveling through and along wires and other conductors without being visible or easily detected; **and a person who deals in it and handles such an element is bound to use a degree of care commensurate to the dangers involved to protect others from harm.**'" (Emphasis supplied.)

In approving this instruction, this Court, speaking through Judge Woodrough, stated at page 489:

"We think the submission of the issue of defendant's negligence on the instructions given is supported by the decisions of the Supreme Court of Iowa and the law of Iowa as declared by this Court. **Reynolds v. Iowa Southern Utilities Co.**, supra [21 F.2d 958]; **Yarn v. Ft. Dodge, Des Moines & Southern Ry. Co.**, 8 Cir., 31 F.2d 717; **McKiddy v. Des Moines Electric Co.**, 202 Iowa 225, 206 N.W. 815."[1]

Defendant's position is two-fold. First, it is urged that because plaintiff was aware that the enclosure in which he and others were working contained 13,200 volt equipment, coupled with his general knowledge that transformers are used to conduct electricity, completely relieved defendant of the duty to give any warning of the danger in and about the emergency transformers. Second, it is said that the warnings imparted by the signs bearing the legend "Danger 13,200 volts," coupled with the verbal statements made from time to time that the area was "hot," completely satisfied any legal obligation with respect to warning so as to remove that issue, as a matter of law, from the case. We are not persuaded to accept either contention.

Reviewing the case in the most favorable light, we find that while there was evidence that knowledge had been imparted to employees of Pittsburgh that the enclosed area was "hot," logically, it can hardly be urged that the entire area was literally charged with electricity, or that Pittsburgh's employees should believe it to be so. Indeed, defendant itself recognized that such was not the situation, for it prepared the plans whereby it became necessary to

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[1] See also Beman v. Iowa Elec. Co., 205 Ia. 730, 218 N.W. 343, 345; Knowlton v. Des Moines Edison Light Co., 117 Ia. 451, 90 N.W. 818; Reynolds v. Iowa Southern Utilities Co. (Iowa), 8 Cir., 21 F.2d 958; Loveless v. Town of Wilton, 193 Ia. 1323, 188 N.W. 874, 877; Toney v. Interstate Power Co., 180 Ia. 1362, 463 N.W. 394, 397.

lay the water main through the area. By so doing, and by directing a specific warning only to the open, uncased, corrugated transformers and the 440-volt bus bar adjacent thereto, the jury could properly find that, implicit in defendant's "invitation" to work within the area was the representation that the area was relatively safe, except around the dangerous instrumentality; i.e., the uncased transformers and bus bar. That the entire area was not virtually a "chamber of horrors" is borne out by defendant's conduct during the course of the pipe installation. Although defendant must be charged with knowledge of the dangerous character of the lead-in wire which injured plaintiff, all specific warnings were directed solely to the uncased transformers. Through its representative who was supervising the installation, the defendant repeatedly warned Pittsburgh employees of the danger that lurked in and about the bus bar and corrugated transformers. They were told "[n]ow, you are getting where that is dangerous. You can walk into that and if you do it will bite. In that situation I specifically pointed out the bus bar because they had piled the dirt so high you could walk right into it." But there the verbal warning stopped. There is credible evidence from which a jury could properly find that at no time was there any warning given that inasmuch as the lead-in wire carried as much as 13,000 volts, it was even more dangerous to work in close proximity to this wire. Surely defendant was fully aware that work was progressing in the immediate vicinity of the emergency transformers. Defendant's supervisor, Mr. Shannon, testified, "I had been there within a few minutes before the accident. I had just left when the accident happened." But he gave no warning of the impending danger, at least there is evidence that he did not. Nor are we justified in holding that, apart from any oral warnings, plaintiff's knowledge, as a reasonable man, concerning the dangerous character of electrical equipment generally, would bar him from recovery as a matter of law. That the

dangerous object which caused the havoc to plaintiff was neither open nor obvious is scarcely debatable for as we have seen, the offending device (the lead-in wire), was covered with insulation, and this, together with the fact that all specific warnings were directed to the 440 volt bus bar, could have the conceivable effect of lulling a reasonably prudent person into a sense of safety. But the insulation was not intended nor designed to render the wire harmless if contact therewith was made. In the words of defendant's Mr. Shannon: "It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, **that insulation was absolutely worthless**—might just as well not be there."

We have indulged in an exhaustive review of the facts, and have carefully studied decisions of the Iowa courts bearing upon our factual situation. As previously discussed, the particularly dangerous element of electricity here involved is a circumstance properly to be considered by a jury in determining whether defendant has exercised ordinary care. Here, there was evidence from which a jury could justifiably find that the wire which injured plaintiff constituted a latent danger; that this danger was known to defendant; that plaintiff did not have actual knowledge thereof and in the exercise of ordinary care on his part would not have discovered the same; and that, under the circumstances, the warning given by defendant was inadequate.

Affirmed.

Van Oosterhout, Circuit Judge, dissenting.

I agree with the majority's conclusion that plaintiff was an invitee of the defendant. Plaintiff was an employee of Pittsburgh, an independent contractor, engaged to do the

construction work here involved. It is stipulated that Pittsburgh's status was that of an independent contractor, and that Pittsburgh under its contract "shall furnish all labor and materials, tools, supervision and methods as outlined in the specifications." Defendant had no supervisory power over the plaintiff, but had only the right to see that the end product of Pittsburgh's work conformed to the specifications. It is apparent that plaintiff was not an employee of defendant. Thus, defendant was under no legal obligation to furnish the plaintiff with a safe place to work. No claim is made that the defendant did anything to create an unsafe condition upon its premises during the period the work project was being carried out. The electrical equipment in the enclosed area, with respect to being energized and in all other respects, was the same at the time of the accident as it was when the project was commenced. Under such circumstances, as the majority properly states, defendant's legal obligation towards Pittsburgh and plaintiff, as Pittsburgh's employee, is that announced in the **Gowing** and **Atherton** cases, cited and quoted by the majority. Defendant's duty to plaintiff as an invitee was to warn the plaintiff or his employer of any hidden danger of which the defendant knew or in the exercise of ordinary care should have known, and which was not known, or in the exercise of ordinary care could not have been known, to the contractor or the injured employee.

The plaintiff was injured by a wire leading into a transformer. There is serious doubt whether any hidden danger situation is presented. Plaintiff concedes that the employees at the time the project was commenced discussed among themselves the wisdom of working in the enclosed electrical area. Plaintiff testified that he was "familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them," and that "it would be a

safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized." He also admitted that transformers are dangerous, primarily the wiring above the transformer.

The injury-inflicting wire led into what are described in the majority opinion as "emergency transformers." At the time of the accident neither the plaintiff nor his employer knew that the transformers were emergency transformers. Plaintiff so testified. So did Pittsburgh's foreman.

If any hidden danger existed as to which defendant was required to give warning, the defendant fully complied with such duty. The electrical area, in which the transformers were located, was enclosed by a fence upon which signs were erected, reading "DANGER 13,200 VOLTS." Similar signs were posted within the enclosed area, one within a few feet of the immediate scene of the accident. Plaintiff admitted seeing such signs. It is likewise established beyond dispute that defendant's foreman orally advised Pittsburgh's foreman that the electrical equipment in the fenced area was "hot," and that defendant's powerhouse engineer gave a similar warning. Such warning was broad and by its terms applied to all of the electrical equipment in the enclosure, of which the transformer and the lead-in wire were a part.

There is substantial evidence by Pittsburgh's foreman that he conveyed the warning information to its employees. Plaintiff testified in substance that he believed his foreman's statement that he gave such warning, but plaintiff states that he did not hear it given. To the extent that any oral warning was required, defendant met its obligation by warning Pittsburgh's foreman. It was Pittsburgh's duty to protect its workmen.

The majority attaches considerable significance to bus bar warnings. The bus-bars were on other transformers

located at some distance from the scene of the accident. It is true that the defendant's employees did in a few instances give specific warning as to the bus bars at a time when Pittsburgh's employees were working in the immediate vicinity of the bus bars. Plaintiff admits hearing the bus bar warning, but states: "The exact location of that bus bar I don't know. If I saw a bus bar I would recognize it immediately and I would know then where it was; but I never actually saw the bus bar." It is difficult to see how plaintiff could have been misled by the bus bar warnings. The bus bar warnings were not inconsistent with and did not detract from the broad overall warning conveyed by the enclosing fence, the signs, and the oral warnings.

Plaintiff also urges that he was misled by the circumstance that the lead-in wire causing the accident was insulated. The testimony is that the insulation afforded no protection on a wire of this voltage, and there is also testimony that lead-in wires of this type are usually bare. Defendant's warnings were not limited to bare wire, but covered the hazards of all electrical equipment in the fenced area. Plaintiff's own testimony shows that he knows that wires above transformers are particularly dangerous. The record does not fairly warrant any inference that the plaintiff relied in any way upon the fact that the lead-in wire was insulated. It is apparent that plaintiff did not learn until after the accident that the lead-in wire which caused his injury was insulated. One of plaintiff's specifications of negligence is, "In failing to cause the wires to which plaintiff was exposed, if live, to be properly and adequately insulated."

The plaintiff has suffered serious injuries in an unfortunate accident. In my opinion he has wholly failed to establish actionable negligence on the part of the defendant. Under the circumstances of this case, the defendant

can not be charged with any negligence that might have existed on the part of plaintiff's employer. The motion for a directed verdict should have been sustained. I would reverse.

A true copy.

Attest: Robert C. Tucker,
Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT ENTERED APRIL 17, 1959.

United States Court of Appeals for the Eighth Circuit.

No. 15887 - - - - September Term, 1958.

Clinton Foods, Inc., a Delaware Corporation,
Appellant,

vs.

Marvin A. Youngs.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 17, 1959.

COPY OF COURT OF APPEALS OPINION FILED JULY 15, 1958.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,887.

Clinton Foods, Inc., a Delaware Corporation, Appellant,
vs.
Marvin Youngs, Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[July 15, 1958.]

Wayne G. Cook and Craig Cook (Cook, Blair, Balluff, Wedean and Nagle were with them on the brief) for Appellant.

Isador Katz (Carl H. Lambach, Margaret Stevenson, Lambach, Stevenson and Dircks, and Reidy, Katz, McAndrews, Durkee and Telleen were with him on the brief) for Appellee.

Before Sanborn, Woodrough and Vogel, Circuit Judges.

Vogel, Circuit Judge.

Clinton Foods, Inc., appeals herein from an adverse judgment based upon a jury verdict in a damage action between citizens of different states and involving more than the jurisdictional amount.

The accident resulting in injuries to plaintiff-appellee occurred in the State of Iowa. The law of that state controls.

Appellant owns a large food processing plant at Clinton, Iowa. In 1953 it awarded a contract to Pittsburgh Piping and Equipment Company for the installation of a 20-inch water main on its premises. Appellee, Marvin Youngs, was then an employee of Pittsburgh Piping assigned to the crew designated to execute such project. Appellant's plans required that the new water main be laid through an enclosure containing two banks of electrical transformers and within a few feet of one of those banks. For lack of adequate space, diggings from the ditch were piled by Pittsburgh's employees in and about the enclosure to within a foot from the top of the emergency transformer base. Work on that raised level put appellee and the other crew members within touching distance from the wires leading to and from the closest transformer. The three transformers on the base were approximately four feet in height and were equipped with apparatus to support the attached lead-in and out-put wires. The lead-in wire, from which appellee sustained the injuries here involved, was mounted vertically outside the end of the support apparatus closest to the ditch. This wire carried an electrical pressure of 6,900 to 13,200 volts. With reference to that particular wire, appellant's mechanical engineer Shannon testified:

> "The wire coming down to the rear on Plaintiff's Exhibit 5, is the one—the high tension line. • • • It comes down and is fastened to an insulator. Loops out here and then goes up into the transformer. • • • The wire that comes down out of this insulator was covered with an insulating substance, but it wasn't insulated for that purpose. It happened that it was the right sized wire and they used it. It isn't customary to insulate that tension of wire and wasn't put

there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there. * * *

We didn't keep the situation in the enclosure in a hazardous condition. We kept this in a very normal condition. We enclose all our tranformer banks. They are not hazardous if you know what you are doing there. We have to work within inches of those hot wires frequently. We weren't asking them to work within feet of it. Normally people who work in there are electricians and not other people: That's why they were cautioned each day to be careful. I knew that these men were not electricians but they were intelligent people. I didn't tell them that there was any switch up there that could open that circuit. I wouldn't have told them that because we didn't want them . . . didn't want that switch open, couldn't be open without creating a hazard."

There were several signs in and on the enclosure displaying the words "Danger 13,200 Volts". One of these signs was mounted on a telephone pole approximately six feet from the spot where appellee was injured. The remaining signs were mounted on the surrounding fence. It is admitted that some of the appellant's employees orally warned the crew, of which appellee was a member, that the enclosure was an electrical danger area. As to the extent and adequacy of such warnings, however, there is dispute. Appellee testified that:

"We had worked intermittently about 5 days in the area. At the time that they first discussed going through that enclosed area with a pipe line, several of the boys and myself discussed whether or not that was a wise idea. Of course we don't design the jobs nor is it our place to say where it goes. Our job is to do it. We discussed that, and the only information or

warning that I ever got was the fact of an exposed bus bar at the far end. That came up at the time when Mr. Owen and Mr. Johnson were laying out elevation lines in the ditch itself, for the excavation of the ditch. That was the incident to which Mr. Morgan testified yesterday. I had never received any warning of any kind to indicate that the wire you are pointing out which runs down a steel flange to what appears to be the rear of transformers that have been identified as emergency transformers, present any unusual hazard. We had not been warned that the wire was the equivalent of a bare wire carrying 13,000 volts. Had it been bare, we wouldn't have gotten within 3 foot of it."

Appellee also testified that:

"• • • transformers ordinarily are dangerous, but it is primarily the wiring above the transformer—high up out of reach—and, as a matter of fact, all of the high voltage wires I have ever seen have been bare wires when they come in a transformer area. From the picture, that wire was covered."

And:

"The warning of a dangerous bus bar was just given generally, that there was an exposed bus bar in the area and that it was, of course, naturally dangerous. The exact location of that bus bar I don't know. If I saw a bus bar I would recognize it immediately and I would know then where it was, but I never actually saw the bus bar.

"I am familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them. I am not an electrician. I am aware though, of some of the things that happen in all those places to safeguard that equipment. I testified that trans-

formers are normally dangerous. It would be a safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized. * * *

I didn't know the exact purpose of these transformers. I didn't know whether they were emergency or in full-time operation."

"The voltage was not too high—13,000 volts. I don't consider 13,000 volts excessively high, no. I observed signs to that effect in the area. There were several metal signs saying 'Danger 13,000'—in the general area, the area as a whole. They were placed on the fence or telephone pole."

Other evidence was offered by both sides showing the nature and extent of the various warnings given to the foreman of the crew and crew members generally.

The laying of the 20-inch pipe line in an open ditch within seven or eight feet from the emergency transformer base required appellee and others to work on an artificially raised ground level in closer than usual proximity to the subject transformer base and lead-in wire. Other than the signs, no specific warnings were given by anyone as to the dangerous character of the high tension lead-in wire from which the appellee received his injuries.

The occurrence of appellee's injuries and the events immediately preceding them are related in the testimony of appellee's foreman, Edward Morgan, quoted in part as follows:

"I saw Mr. Youngs immediately before he got hurt. I was standing on one of the dirt piles north of that emergency transformer bank, facing towards the slough.

We were putting this piece of pipe in the ditch, and we had a chain fall on this timber over the center of the ditch. We had a rope snubbed on each end of the

pipe and Sullivan and I was on the one end and we had it snubbed around a telephone pole, and the other boys, two of them were on the other one or one of them was, or one on the chain fall, I don't remember. I know I was on the one line that was around the telephone pole, and we was holding the pipe back snubbing it while it was being dragged in the ditch by the chain fall with the fellow on the chain fall and as the pipe swung in the ditch and settled down I looked up, turned to the pump house and looked up and Bud (appellee) was taking a step or was going off that plank, as I see it, off the plank towards the pump house, and the only thing I think he was going, he was going over to the ladder next to the pump house to go down the ladder to help land the pipe in the ditch. As he stepped in that direction I saw a big flash and a drop of—like a drop in power or short, and that was it. * * * Bud fell back I would say north away from the pump house, and he fell and his shoulders hit across the timber we had across the ditch and his arm fell over the top of the timber and his head, or whichever you want to call it, head or neck, maybe a difference of opinion there, rested up against the angle iron on the corner of that transformer bank. The dark end spot on the angle iron, as it appears on Plaintiff's Exhibit 3, is where his head or neck was resting—that burned spot."

The case was submitted to the jury on instructions to which no exceptions were taken. Clinton's appeal, however, is based upon the question of liability and its contention that there was insufficient evidence under the law of Iowa to take that issue to the jury. See **Coca-Cola Bottling Co. of Black Hills v. Hubbard**, 8 Cir., 1953, 203 F. 2d 859, 861. Appellant's timely motions for directed verdict and for judgment notwithstanding the verdict were denied. It is from these rulings and the judgment

of the trial court based upon the verdict herein that appellant makes its specific claims of error.

The primary question goes to the sufficiency of the evidence. Before appellant can prevail, it must be determined that there was no reasonable basis upon which findings of negligence in appellant and its ultimate liability for appellee's injury could be based. **Egan Chevrolet Co. v. Bruner,** 8 Cir., 1939, 102 F. 2d 373, 377, 122 A. L. R. 987; **Gowing v. Henry Field Co.,** Iowa, 1938, 281 N. W. 281, 283.

We think the applicable Iowa law regarding the duty owed by an owner to an independent contractor or an employee of such contractor is most carefully stated[1] in **Gowing v. Henry Field Co.,** Iowa, 1938, 281 N. W. 281, 284:

> "The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was

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[1] In its opinion, the Iowa Supreme Court stated:

"That the plaintiff fell and sustained a serious injury is not disputed. The case was submitted to a jury which returned a verdict for the plaintiff in a substantial sum. Counsel for appellee have gone to great pains and expended a great deal of labor and effort to sustain this verdict. In view of these facts, we have given this case our very careful study and consideration well realizing that ordinarily the questions of proximate cause, as well as contributory negligence, are matters for the jury and it is only where the facts are such that all reasonable men must draw the same conclusion from them that these questions become questions of law for the court. In passing on defendant's motion to direct a verdict, the plaintiff is entitled to have the evidence considered in the light most favorable to him. Willers et al. v. Flanley Grain Co., Iowa, 275 N. W. 474. 'Every inference reasonably permissible in support of the issue should be carried to the aid of the evidence.' McWilliams v. Beck, 220 Iowa 906, at page 909, 263 N. W. 781, at page 782. Having in mind these rules, we still find that defendant's motion should have been sustained."

not aware or which in the exercise of ordinary care on his part would not have been discovered. **Steele v. Grahl-Peterson Co.**, 135 Iowa 418, 109 N. W. 882.

Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew of or ought to have known of, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co., 89 Conn. 622, 95 A. 22, 25; 44 A. L. R. 894, note; **Arizona Binghampton Copper Co. v. Dickson, Adm'r, etc.**, 22 Ariz. 163, 195 P. 538, 44 A. L. R. 881." (Emphasis supplied.)

In that case the plaintiff, an independent contractor, was injured in attempting to descend from the flat roof of a two-story building by means of a fire escape which he alleged was in a defective condition. A jury returned a verdict for the plaintiff and judgment was entered thereon. The Supreme Court of Iowa reversed, holding that defendant's motion for a directed verdict should have been granted. In so doing, the Iowa court quoted with approval from **Stein v. Battenfield Oil & Grease Co.**, 1931, 327 Mo. 804, 39 S. W. 2d 345, 351, where plaintiff fell into a rapidly moving belt and the court held as follows:

"'The deceased, in going to the respondent's plant as an independent contractor to do work, was an invitee. The respondent would be liable for injury to him occasioned by any unsafe condition of the premises encountered in the work, which was known to it but unknown to him; **but was not liable for injuries resulting from conditions obviously dangerous and known by the deceased to be so.**'" (Emphasis supplied.)

In the very recent case of **Atherton v. Hoenig's Grocery**, Iowa, 1957, 86 N. W. 2d 252, 255, 256, the Iowa Supreme Court restated the law applicable to this case:

> "The possessor of real estate is not an insurer of the safety of those who come upon his premises by invitation, express or implied. Negligence is predicated upon an unperformed duty. The duty owed by the inviter is to those, and to those only, who do not know, or, in the exercise of reasonable care for their own safety, have no reasonable means of knowing, of defects or dangers. He may avoid liability in two ways: by making and keeping his lands safe, or by warning of the dangers. Obviously, actual knowledge of defects and dangers is equivalent to, perhaps better than, a warning. The Virginia Supreme Court has well put the rule in these words: 'The duty to warn, however, exists only with respect to latent dangers, not to those which are or ought to be obvious to the invitee. To sustain a charge of negligence the unsafe condition relied on must be one of which the owner knew or should have known, and the invitee did not know and could not reasonably have discovered.' **Trimyer v. Norfolk Tallow Company**, 192 Va. 776, 66 S. E. 2d 441, 444. * * *' **Zuercher v. Northern Jobbing Company**, 243 Minn. 166, 66 N. W. 2d 892, 897 ('* * * there is no duty to warn a business visitor or an invitee against dangers which are known to the latter or which ought to be known and obvious to any person in the exercise of reasonable care.') * * *."

The duty owed by an owner to an employee of an independent contractor is the same as the duty owed to the contractor. **Steele v. Grahl-Peterson Co.**, Iowa, 1906, 109 N. W. 882, 883. For an additional statement of the Iowa rule regarding the appellant's duty see our opinion in **American Dist. Telegraph Co. v. Kittleson**, 8 Cir., 1950, 179 F. 2d 946, 950.

Under the Iowa law as announced in the **Gowing** and **Atherton** cases, the only duty owed by Clinton Foods as owner to Youngs as an employee of Pittsburgh, the independent contractor, was that of giving him warning of any danger in and about the premises of which it was aware or which, in the exercise of ordinary care, it should have become aware and of which Youngs was not aware and which, in the exercise of ordinary care, he would not have discovered. This case, then, resolves itself into a question of whether or not the danger was a latent or hidden one unknown to the appellee. We think clearly it was not.

In the first place, the area containing the transformers was enclosed by wire fence and walls, obviously to keep persons from coming in contact with the transformers and other dangerous electrical equipment therein. Several metal warning signs were placed on the fence and on a telephone pole within the enclosure, carrying the legend "Danger 13,200 Volts". Any person of normal intelligence would be immediately aware of the danger, that is, that the enclosed area was "hot". Appellee himself admits talking to co-employees about the advisability of trying to lay a water main through this area, thus indicating an awareness of the danger. The work proceeded, nevertheless. Appellee worked there in the area about five days. He knew that "transformers ordinarily are dangerous". He was "familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them". He testified that, "it would be a safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized". He did not "consider 13,000 volts excessively high". He observed the "metal signs saying 'Danger 13,000'—in the general area, the area as a whole". We do not think reasonable minds could come to any conclusion other than

that the danger here was open and obvious and that the appellee was aware thereof.

Appellee argues that the particular lead-in wire to the transformers and with which he came in contact carried insulation and ordinarily lead-in wires carrying voltage this high were bare, as insulation on such was ineffective. The subject wire obviously was connected to the transformer and near it, within a distance of a few feet, was a metal sign carrying the warning, "Danger 13,200 Volts". The likelihood of danger in such a wire, leading into the transformers and having a warning sign near it and being confined within a protective enclosure carrying additional warning signs, should be obvious under the most exacting requirements. Reasonable minds could not say that this was a latent or hidden danger of which specific warning should have been given to appellee. There was no duty on the part of appellant to precede the workmen and point out the different voltages of the different wires within the hot or danger area. Applying the Iowa rule as set forth, supra, the appellant violated no legal duty that it owed to the appellee. The warnings given were adequate and in addition, the danger was obvious. A contrary holding would make the appellant an insurer, which it was not.

We have examined all of the cases which the appellee claims support his right of recovery. None of them changes the rule as stated in **Gowing v. Henry Field Co.** and **Atherton v. Hoenig's Grocery**, supra.

Reversed.

Woodrough, Circuit Judge, dissenting.

I am in complete disagreement with the declarations of the majority opinion on which it rests decision that the danger to which plaintiff was subjected, from which, he

suffered injuries, was "open" and "obvious" and that "plaintiff was aware thereof".

(1) I think it was neither "open" nor "obvious". It consisted of some 13,000 volts of electricity that ought to have been conducted in a bare wire or bus bar. When so conducted into transformers the danger of it is laid "open" and "obvious" to men of plaintiff's experience who have to work around them (if it is placed where they see it). Instead of being so conducted the wire that carried the current that injured plaintiff was covered up with insulating material that would not insulate it, but did hide the function it was performing and its deadly danger. The proof was that the way the seemingly safe insulated wire came to be conducting the high voltage was, "because it happened to be the right size and they used it." . . . "Normally that wire would be bare."

(2) I think plaintiff was not aware of the danger to which he was subjected by which he was hurt. The signs posted about the enclosed area where he was working as an invitee of defendant did not mean to plaintiff "that the [whole] enclosed area was hot". Having worked around transformers before, he knew better than that, and if a warning was given to him that "the enclosure was an electrical danger area", such a warning could have done him no good. His quoted and unquoted testimony reflects that being a pipe fitter and not an electrician he fully shared the ordinary fears of the ignorant about undefined dangers that maybe lurk in transformers and in areas containing transformers.

But there is no reason to connect such vagaries of imagination with this case. Plaintiff was not hurt by any mysterious or ghostly danger of the transformers or of the area where they were. Men work around transformers, as did plaintiff, thousands of them daily and perhaps one occasionally gets hurt through such a danger. But

plaintiff was injured by electric shock transmitted to him from the specific covered up wire above described. A defined concealed danger that defendant was fully aware of. The question in the case is whether plaintiff had knowledge of that specific danger that injured him, that I have called "latent" and "not open"? If was proved that the casings of the transformers herein were not hot. They were effectively insulated. Plaintiff said that all the high voltage wires to or from transformers he had ever seen were bare wires [or bus bars] when they come in a transformer area. The proof is that in practice they are bare. "Bare wires are normal." He testified without contradiction that he was never warned that the wire from which he received the shock presented any unusual hazard and that he had not been warned that it was the equivalent of a bare wire carrying 13,000 volts. He added to that what he intended to be and should be taken to be his positive and unequivocal denial of such knowledge on his part. "Had it been bare we wouldn't have gotten within three feet of it." I find no ground to justify a conclusion that his denial of knowledge was false and certainly none that it was so palpably false that the jury had no right to believe it. I dissent.

A true copy.

Attest: Robert C. Tucker,
Clerk, U. S. Court of Appeals, Eighth Circuit.

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